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BRIEF IN SUPPORT OF PETITION.

I.

Opinions of the Courts Below.

The opinion of the District Court, its Findings and Conclusions of Law are set forth in the Printed Record, pp. 25-46, and partially in 2 F. R. D. 117; and that of the Second Circuit in 133 F. 2d, 468-470; both are incorporated herein for brevity. Certain parts are quoted in the Argument.

II.

Jurisdiction.

Jurisdiction of this action exists because the parties are citizens of different states, and the matter in controversy involves $68,632, exclusive of interest and costs.

III.

Statement of the Case.

This has already been stated in the Petition, which is hereby adopted and made part hereof, with such additional statements as are contained herein.

IV.

Specifications of Errors.

These have also been stated in the petition and are hereby adopted and made a part hereof.

V.

Argument.

Introduction.

We apologize in advance for the length of this brief, and that of the Petition, but the number of the claims, most of which have to be treated individually, and the number and

complexity of the questions of law involved, we submit, make an intelligent presentation of the Petition difficult, and some length is unavoidable.

It is submitted that the importance of the questions involved is of general public interest, and especially so because the applicable decisions of this Honorable Court; of the Supreme Court of Errors of the State of Connecticut; of the Second and other United States Circuit Court of Appeals; and of the clear weight of authority of other States, which have construed similar contracts, have apparently reached a contrary result.

The decision in this case invokes and establishes rules of law that never obtained in Connecticut, and, in this modern age, establishes rules of law long outmoded, because unfair and inequitable; and above all, that have long been disfavored, generally, by this Honorable Court and by other Courts, constituting the weight of authority or the better reasoned cases.

In particular, Connecticut Courts never construed such contracts so as to establish a doctrine which may be described as the rule of "tooth and claw"; nor so as to *lead a contractor astray;* nor to enforce so-called *cut-throat bargains,* as such provisions are called by some Courts, (66 A. L. R. 651).

The history of the evolution of the law of contracts of this kind, with their exculpatory clauses, seeking to throw all risk of loss on the contractor, shows they have not been strictly enforced, as they were in this case. *Courts have been guided, rather, by equitable and practical considerations such as: (1) What did the contractor agree to do, i. e. what did the parties contemplate was to be done under the contract; and (2) Has the contractor done more than the parties contemplated when they made the contract, and if so, what was it reasonably worth?*

With such equitable and practical considerations influencing the Courts, the body of the law as it now stands, is just and equitable to both parties.

It is for these basic reasons that this Petition is presented, and because a law of contract has been established which is contrary to the weight of authority in all Courts, or the better reasoned cases, and allows and enforces the use of contractual devices which have long been unfair and unjust in their consequences, because the contractee in every case derives the benfit of additional work.

It is extremely important, we submit, that the decision here be reviewed because it establishes an unjust law where more equitable and practical considerations have been applied and enforced, and it is a subject of general importance to contractors, owners and the general public, at a time when a large amount of work, controlled by such provisions is being done and in prospect.

It is respectfully submitted that the construction of such a contract is so well settled that little argument is needed to show the decision here is clearly wrong, and that this Petition should be granted and the case fully argued on the merits.

ARGUMENT.

The Court was clearly in error in failing and refusing to following the "local law" and applicable decisions of The Supreme Court of Errors of the State of Connecticut whose decisions are controlling.

Erie R. Co., v. Tompkins, 304 *U. S.* 64.
Ruhlin v. New York Life Ins. Co., 304 *U. S.* 202, and 262.

In the *Ruhlin* case, this Honorable Court says:

"... The parties and the Federal Courts must now search for and apply the entire body of the substantive law governing an identical action in the State Courts ..."

And in the *Tompkins* case:

". . . it is settled beyond question that it is the Pennsylvania law which the Federal Courts . . . are bound to apply . . .

"The Pennsylvania decisions should have been recognized as controlling because they had established the rule of law with sufficient definiteness and finality to constitute a local rule of property, action or contract, even though the question might otherwise have been regarded as mainly one of general law . . ."

Ever since 1823, The Supreme Court of Errors of Connecticut has allowed recovery outside of the contract, although there was a written agreement governing what the parties contemplated when the agreement was made, when work and materials made necessary by unforeseen difficulties or unanticipated circumstances not covered by the contract make it inequitable, inconvenient, unduly onerous or impractical from a commercial standpoint to complete the contract work.

Alvord v. Belden, 4 *Conn.*, 461-465, (1823).
Connelly v. Devoe, 37 *Conn.*, 570.
Tryon v. White, 62 *Conn.*, 161.
Casey v. MacFarlane, 83 *Conn.*, 442, 443.
Mahoney v. Hartford Invest. Corp., 82 *Conn.*, 280.
Water Comrs. v. Robbins, 82 *Conn.*, 623.
E. & F. Construction Co. v. Stamford, 114 *Conn.* 250.
Blakeslee v. Water Comrs., 106 *Conn.*, 642.
Blakeslee v. Water Comrs., 121 *Conn.*, 161.

In *Alvord v. Belden, supra,* plaintiff agreed to repair defendant's vessel—*to take her down to below her wales,* put in top timbers, wales and waist, take off and replace her decks, replace all defective timbers and raise her to a two-decker for which defendant agreed to give him one-third of the brig. During repairs it was discovered that timbers below the wales were entirely defective; whereupon, plaintiff under the authority and by request of defendant, made repairs upon the bottom below the wales. It was held: the

repairs so made below the wales were not included in the written agreement and recovery was allowed for reasonable compensation in addition to the contract price. The Court says: (p. 464).

"The sole controversy . . . depends on the solution of the question, whether, by the written contract . . . plaintiff contracted to repair the bottom of the brig below her wales . .

"It appears from the written contract . . . plaintiff agreed *to . . . take her down to below her wales.* This leading expression . . . imports . . . plaintiff was to reduce the vessel down to her wales and *immediately* below them. If the contract be construed to extend beyond this limit, it must be considered as including the entire bottom of the brig, even to the extremity of her keel; for which no one can seriously contend . . . . By the defendant, it is insisted, that the expression is entirely indefinite, and obliged the plaintiff to replace defective timbers in every part of the vessel; but this construction is too extravagant, for a moment to be admitted. The error of the defendant consists, in giving an exposition to the phrase in question, without regard to the other parts of the contract. But the construction must be made on the whole agreement . . .

"The general object of the parties, was, to put on the brig an additional deck; and probably the contract would not have existed, if her bottom had been considered to be materially unsound. At least, it is a fair presumption, had it been anticipated that her bottom was in a defective condition, that the repair of it, would have constituted a prominent feature of the agreement. It could never have been the intention of the parties, to put on the brig a double deck, if a suitable foundation was deficient. But it is entirely probable, from the silence of the agreement, that the defects were latent and first discovered on taking the brig down below her wales."

In *Connelly v. Devoe, supra,* this rule was applied, where plaintiff, who agreed to dig a well for defendant, met with unexpected difficulties in the caving of the sides—the sand proving unusually bad for well-digging—which necessitated shoring and special equipment. He was unable to complete within the time limited, due to the above circumstances.

He was not only allowed recovery for additional compensation but was relieved from a liquidated damage provision of the contract.

In *Tryon v. White, supra,* after the contract was made, changes were made in locating a building which required deeper foundation and more materials than the plans showed. Plaintiff recovered *outside* of the contract because the work was in fact extra, and defendant had received and retained the benefits, although there was no clear contract to pay, it was the *understanding of plaintiff* that a promise to pay for the extras had been made, and defendant had seen the work being performed day by day.

In *Casey v. MacFarlane, supra,* the parties were in dispute as to whether the *furnishing and laying certain brick was included in the contract.* The contract had a "written order" provision for *alterations and changes which was not complied with.* Plaintiff recovered on an implied promise to pay, the court saying:

"When the parties deviate from the original plans agreed upon, and the terms of the original contract do not appear to be applicable to the new work, it being beyond what was originally contemplated . . . it is undoubtedly to be regarded and treated as work wholly extra, out of the scope of the contract, and may be recovered for as such . . .

"The provision in the contract that "no alterations shall be made . . . except upon the written order of the architect is not applicable to plaintiff's claim.

"The materials and labor here sought to be recovered for were never contemplated in the original plans and specifications, and were not alterations within the provisions of the contract. (citing cases).

"It is fair to assume that both parties remembered the terms of the contract and knew its legal effect. When the defendant requested the plaintiffs to perform its work and furnish these materials, which were not included in the contract, the plaintiffs had a right to understand that the defendant consented to be liable therefor.

The decision is based on the principle that where work is performed under circumstances which raises a fair presumption that the party allowing its performance and receiving the benefits, expected, or ought to have expected, that they were to be paid for regardless of whether any specific bargain is or is not made concerning it.

In the *Mahoney* case, *supra*, recovery was allowed on such an implied contract, (citing Fitzgerald Constr. Co. v. Fitzgerald, 137 U. S. 98), despite "written order" provisions of the contract not complied with. In Henderson Bridge Co. v. McGrath, 134 *U. S.* 260, a leading case, recovery was had on an implied contract, where there was no express agreement to pay for work done outside of the contract. See also Goddard v. Foster, 17 Wall, 123.

The *basic error of both Courts*, in the case at bar, *was in restricting any recovery to compliance with, as a condition precedent, all of the terms of the written contract.* There are a great many reasons why such a construction of the contract is clearly erroneous, *as matters of law*, and *not as matters of fact, as the trial judge concluded* (R. pp. 26-30). *The Second Circuit seems also to have treated such matters as questions of fact, when they are in their very essence, questions of law. The rule is clear—the construction of the plans and specifications and the contract, is universally held to be a question of law. It is so held in Connecticut, where the contract was made and performed, and is reviewable as matters of law.*

Mazziota v. Bornstein, 104 *Conn.*, 430, 435.

It was clearly error, for said Court, on appeal, *to follow the findings of the trial judge. The findings are incomplete, as they omit many admissions, undisputed evidence, and inferences that should be drawn from the testimony of a disinterested expert, and include many findings that are inherently improbable, and contrary to common knowledge, practical engineering experience, and show that both courts failed to*

grasp the problems involved. But that aside, there are controlling considerations which must necessarily be inferred from the plans and specifications; the other written documents in evidence and the inferences to be drawn from them upon a proper construction, which as matters of *law,* impel the conclusion that the Courts clearly erred in their construction and interpretation of them and the judgment should be reversed.

The Court was clearly wrong in construing Exhibit A, pp. 21-22 par. D as a condition precedent, and in enforcing it if it were under the circumstances disclosed by the finding upon a proper construction of the provisions. At most, they constituted a collateral agreement or penalty and formed no part of the agreed exchange. Their enforcement leads to unjust and inequitable results, especially when the respondent has, and retains the benefits of work of great magnitude and expense, and there is no way for the Court to restore the status quo.

There are many ways to legally and equitably avoid the consequences of these provisions and many courts are loath to enforce them. They may be waived or a new or substituted agreement be made which will avoid such consequences. Estoppel is a remedy of most frequent application, perhaps, because in the very nature of things it is inequitable to allow a person to watch improvements being made from day to day, without stopping the work; or by giving verbal orders, knowing no written orders have been given, and *standing by and seeing work of great magnitude and cost being placed on his property, so that it is inequitable for him to escape payment and yet receive and retain the benefits.*

Annotation, 66 *A. L. R.* 650ff, and many cases discussed.
Mahoney v. Hartford Invest. Corp., 82 *Conn.,* 280.
Tryon v. White, 62 *Conn.,* 161 and cases cited.
Blakeslee v. Water Comrs., 121 *Conn.,* 163ff. (180).
Williston on Contracts, Secs. 676 (4); 807.

Sartoris v. Utah Constr. Co., 21 *F. 2d*, 1.
United States v. Barlow, 184 *U. S.* 123.

In *Mahoney v. Hartford Invest. Corp.*, 82 *Conn.*, 280, 287, the Court says:

"It is apparent that Mr. Garde had authority to make these orders for extra work. The directions by him, for the performance of this work not called for by the contract, are necessarily and of themselves a waiver of any requirement for written orders by the architects . . ." (Again, p. 286, it says): "Mahoney expended his money and furnished labor and materials for the benefit of the corporation. The corporation has accepted it, and it is under obligation to pay him as much as his labor and materials are fairly worth."

Both Courts erroneously held these and other cases cited on these questions *did not apply.* They necessarily *must* apply when respondent admitted, as to most of these claims, that it verbally ordered the work to be done that way, and other parts of the court's findings show unmistakably that it was present by its Engineer in Charge, its Chief Inspector, and other inspectors and admitted that it saw everything being done, and did not stop the work, but acquiesced in its performance. *It is then, a pure question of law and the courts clearly erred in the conclusions reached.*

Equity will not permit one to enrich himself at the expense of the other.

Fischer v. Kennedy, 106 *Conn.*, 484, 493.

A condition will be excused without other reasons if its enforcement (a) will involve extreme forfeiture or penalty; (b) its existence or occurrence forms no essential part of the exchange for performance.

Restatement of Contracts, Sec. 302 (a) and (b)

From a practical standpoint, neither party intended that these provisions would be a means of inflicting a wrong on the contractor if they were not complied with. They formed

no part of an agreed exchange when the contract was made, because both parties intended that if any extra work was done that the written orders would be given, or that some means would be taken to avoid inflicting a penalty on the contractor. A contractor would bid the same amount on the contract for the work represented, as he would if they were not in the contract. They were then collateral agreements for a penalty, and it is against public policy, equity and good conscience to enforce them. It would be highly unreasonable to construe this provision,—one of extreme forfeiture, in favor of respondent, the author of the language. No prejudice has been shown—on the other hand, as we shall see, it received great benefits, and should be compelled to pay for their reasonable worth!

Restatement of Contracts, Sec. 302, Comment a and Illustration 1.

McIsaac v. Hale, 104 *Conn.,* 374, 379.

In that case plaintiff agreed to make improvements on property leased to defendant, who *agreed to pay additional rent upon the submission of bills to defendant* and *when the parties should agree on the amount of costs.* Some of the bills were submitted, but not all, and no agreement ever reached as to the costs of such improvements. Defendant claimed that the submission of bills and an agreement upon the amount were *conditions precedent.* The court held they were not, saying:

" . . . If the provision for submission and agreement on the bills was a condition precedent, then it was intended that the defendant should enjoy the improvements without compensation to the plaintiff unless the condition was met. We cannot so construe the lease, and we hold the second undertaking to be a distinct and independent one. The main contract, by which the plaintiff furnished the improvements, and for which the defendant agreed to pay additional rental, was an executed contract. The second provision was executory, and its obligation was contingent upon the making of

these improvements and accrued thereupon. It furnished a method of computing the sum which the defendant became obligated to pay as increased rental after the additional improvements had been made."

The applicable decisions of Connecticut relative to construing conditions precedent so as to avoid injustice, inconvenience, undue hardship, oppression and unconscionable advantage are based upon the principle that *such conditions result in consequences not actually intended by parties,* have their foundation in Eldred v. Hawes, 4 Conn., 465, 469 (1823) where the court says:

"In support of the rigid construction, rendering the demand a condition precedent, there are the *words* of the contract only; but that a presentment and demand were not understood to be an essential part of the contract, the *subject matter,* and the *effects* and *consequences,* make it abundantly manifest.

"It can scarcely be believed, that a creditor should agree with his debtor, or that the latter should request an agreement, *if through accident or negligence, the demand were not strictly made . . . that an honest debt should be forever lost;* and yet on this foundation rests the defendant's position . . .

"It requires no authority to show, that every contract, . . . should receive a construction, in avoidance of injustice and inconvenience. What can be more unjust, than to require . . . a rigid punctuality of demand, on pain of forfeiture of a debt? . . ."

Building contracts are widely distinguished from a general right of recovery by reason of the inequity of permitting a great loss, to the unjust enrichment of the owner, because of no opportunity for courts to restore the *status quo.*

Williston on Contracts, (1924 Ed), Secs. 676 (4); 807.

Plaintiff complied with the condition, and the Court was clearly wrong in holding otherwise, and in putting an over-

literal construction thereon, going far beyond its language; and in failing to construe the entire contract more strictly against defendant, the author of the language.

Horgan v. Mayor, 55 *N. E.* 204.
Drainage Dist. v. Rude, 21 *F.* 2d, 261.
Elberton Cotton Mills v. Ind. Ins. Co., 108 *Conn.,* 707, 710.

A careful reading of Exhibit A, pp. 21-22, par. D (1 and 2) shows that the filing of an itemized statement together with vouchers for the quantities and prices of such work, etc. was agreed to be a condition precedent *only when requested* by defendant, and it is limited to the right to "receive additional compensation *under this contract.*" Defendant *conceded* it made no such request. (p. 748). No prejudice was or could be shown, because defendant admittedly, was present by its inspectors every day and saw all the work and materials as they went into the job.

In *Elberton Cotton Mills v. Ind. Ins. Co., supra,* a fire insurance policy provided that an itemized proof of loss, if not filed in 90 day of loss by fire, would result in a forfeiture of claim. The court reviews the authorities, and holds *that no forfeiture resulted from non-compliance with this provision,* and points out the disfavor with which such clauses are construed by courts; and the rule that such clauses of "doubtful meaning" should be construed most favorably to insured, as strict enforcement would be a "pitfall or snare to the unwary," for which purpose they are not intended. It distinguishes between the *initial notice affording an opportunity for prompt investigation, and the detailed proof;* the former being of the essence of the contract, the latter not. It also held that defendant had not been prejudiced, and no equitable reason existed to declare a forfeiture.

Our *initial notice* was sent February 5th, 1938, *before the work claimed for was completed.* No *award* had been made. *There existed no reason for prompt investigation of defend-*

ant, because it ordered the work, and knew every item of labor and material that went into this extra or new and different work. To enforce a forfeiture here would be shocking to a court of equity, when no objections were made by defendant when the work was being done, but it acquiesced in its performance. Defendant cannot equitably say that it is not liable to pay what such work was reasonably worth.

Blakeslee v. Water Comrs., 121 *Conn.*, 163, 180.
Tryon v. White, 62 *Conn.*, 161, and cases cited.
Sartoris v. Utah Constr. Co., 21 *F.* 2d. 1

In the *Sartoris* case, *supra*, the court say in substance:

Could the railroad company reasonably conclude that plaintiff, who was under no obligation to proceed would gratuituously proceed at a loss of $200 per day or $6000 per month, or an aggregate of more than $70,000 on a $140,-000 job? It would have been better if plaintiff had declined to proceed without a definite agreement in writing, but *his want of caution does not amount to a waiver or deprive him of a valuable right. Looking backward we may see want of caution or forcsight in most business transactions that result in litigation. The railroad company was under an obligation to make its position clear. It did not stop the work. It should have known that the radical changes required additional cost which all must have at once realized would be great. Defendant was held liable.*

See also: Annotation, 66 A. L. R. 650ff.

The Court, on appeal, was clearly in error in saying:

" . . . No claim in writing was made when the work was being done. The contractor cannot fairly contend that the work constitutes extras under the contract without complying with the contract provisions . . ."

In argument below, counsel for defendant states:

" . . . The appellant cannot fairly contend that these claims would not constitute extras under the contract and

the contract provisions covering them should have been complied with by it . . ."

This statement of counsel and the court embraced Claims 1, 2 and 3, totalling $42, 807.84. *It would apply equally to Claims 4, 6, 9, 11, 12, 13, 14, and 15, aggregating about $62,000, or 90% of all claims, as they arise out of the construction of the contract as applied to unforeseen difficulties and unanticipated circumstances encountered for the first time in opening the trench, or from directions by defendant to perform work not called for in the plans or specifications, and upon which the minds of the parties never met.*

Even if the conditions had not been complied with, ways exist, as matters of law, to dispose of them favorably to plaintiff:

1. They do not apply to recovery on the basis of quantum meruit.

2. They were waived, by the giving of oral authority and requests to do work which was in fact extras, either under or outside of the contract; or defendant is estopped to assert them under the circumstances found and discussed.

> *Mahoney v. Hartford Inves. Corp,.* 82 *Conn.,* 280, 287.
> *Salt Lake City v. Smith,* 104 *F.* 457. (8th Cir.).
> 66 A. L. R. 650ff, (Annotation) and cases cited.
> 51 *Yale Law Journal,* 162ff and cases cited.
> *Blakeslee v. Water Comrs.,* 121 *Conn.,* 163, 180.
> *Casey v. MacFarlane,* 83 *Conn.,* 442, 444.

3. Even if there were no express oral promise to pay for such work there is a duty *which the law imposes for reasons of justice to make fair compensation for what has been properly and actually received by defendant which it has accepted and made use of for its own increase and advantage.*

> *Tryon v. White,* 62 *Conn.,* 161.
> *McCaffery v. Groton Etc. Ry. Co.,* 85 *Conn.,* 584.

The Court clearly erred in holding that "merely because the contract proved unprofitable to the plaintiff the contract provisions may not be disregarded."

Plaintiff made no such claim, so the Court must have misunderstood the theory of recovery. It did claim that constructing the sewer, as required by defendant, and in view of the unforeseen difficulties it encountered, which were not shown on the documents submitted to it, as the admitted basis for making its bid, *the cost of the work it actually had to perform was so vitally different in character and cost that it would be inequitable to throw the loss upon plaintiff, relying upon cases cited above, and what seems to be the weight of modern authority in both state and federal courts.* Though the bases of recovery may be different, the result is uniform and recovery allowed despite such contract provisions if such a loss is substantial, vital, radical or material.

Salt Lake City v. Smith, 104 *F.* 457. (8th. Cir.).
Freund v. United States, 260 *U. S.* 60.
United States v. Atl. Dredging Co., 253 *U. S.* 1.
United State v. Stage Co., 199 *U. S.* 414.
Montrose Contracting Co. v. Westchester, 80 *F.* 2d. 841. (2d. Cir.).
Blakeslee v. Water Comrs., 106 *Conn.*, 642, 655.
51 *Yale Law Journal*, 163, 165, and cases cited.
6 *Williston, Contracts* (1938) Sec. 1931.

The Court was clearly wrong in refusing to allow recovery under the doctrine known as unforeseen difficulties or unanticipated circumstances, even though under the contract there are various exculpatory clauses seeking to throw all loss on plaintiff, and in construing said clauses strictly against plaintiff in their literal sense, without giving any effect to limiting or restrictive clauses, or to special provisions, which they specified were to govern; and especially so, when the contract did not have a clause exonerating defendant from unforeseen difficulties.

E. & F. Constr. Co. v. Stamford, 114 *Conn.* 250.

Salt Lake City v. Smith, 104 *F.* 457.
Montrose Contr. Co. v. Westchester, 80 *F.* 2d. 841.
United Constr. Co. v. Haverhill, 9 *F.* 2d. 538.
Hollerbach v. United States, 233 *U. S.* 165.
United States v. Smith, 256 *U. S.* 11.
51 *Yale Law Journal*, 163 and cases cited.
76 A. L. R. 268, Annotation, and cases cited.
Williston, Contracts, Vol. 6, Sec. 1931 (1938).

Courts have refused to enforce such clauses where the burden of risk become unduly severe because of circumstances under which most municipal contracts are executed, and consequences a rigid enforcement produces. Strict enforcement might lead to collective increases in all bids causing excessive prices where such difficulties fail to develop.

Christie v. United States, 237 *U. S.* 234.

A contractor unable to suffer a large loss would be forced to repudiate, stopping work on important public projects. Either result is a crude adjustment of risks which can be more equitably allocated after the extent of the contingency is known. And a basic reason for permitting recovery is that in every case the owner, and not the contractor derives the benefit of additional work.

Recovery is usually allowed *if the contractor was reasonable in relying upon the representations,* and *the deviation from the plans and specifications sufficiently justify added compensation.*

51 *Yale Law Journal*, 163 and cases cited.
76 A. L. R. 268, Annotation, and cases cited.
See cases cited herein.

In *E. & F. Constr. Co. v. Stamford*, 114 *Conn.*, 250, the rule in *Connecticut* is stated:

" . . . The purpose of these representations is to supply information to bidders upon the job who were expected to act upon it, and entitled to act upon it, in making their

bids. They purported to be based upon actual investigation of the subsurface by competent engineers, were adopted by defendant as its own, and carried with them the assertion of superior knowledge and information. They were authoritative and misleading. The plaintiff was . . . induced by them to enter into the contract. The defendant is responsible for the consequences of the plaintiff's reliance upon its misstatements regardless of whether they were made in good faith . . ."

The ground of recovery in Connecticut, as laid down in that case, is in the nature of a breach of warranty.

This Honorable Court has based recovery on the ground they are to be taken true and binding on the defendant.

The basis of recovery in Salt Lake City v. Smith, 104 F. 457, is quantum meruit, in that it is new and different work, not governed by the contract terms.

Most Courts have followed the reasoning in cases decided by this Honorable Court in allowing recovery, though on, perhaps, different theories, as laid down in *Hollerbach v. United States supra; United States v. Spearin, supra, Christie v. United States, supra,* and numerous other cases cited in the above references.

The contract here did not have a clause exonerating defendant from unforeseen difficulties. It was conceded by defendant that it did not expect a bidder to check up all the underground conditions and structures in the two weeks intervening between the advertising and opening of bids, but only to look over surface objects; that errors and mistakes in the information given to bidders, would put him at a disadvantage; it expected a bidder to make such information the basis of figuring his bid, and that the investigation it made was conducted by expert engineers and technicians under its supervision and direction. (p. 927-930;

The District Court laid great stress on a personal examination by plaintiff in going over the site of the work before making its bid (R. pp. 36-37) saying:

"And the blue prints bear the warning that the contractor must satisfy itself as to the existing structures, as the plot was not warranted to be "even approximately correct". Ciraci testified that he personally examined the terrain before he made his bid. There seems no excuse for a misunderstanding here."

It applied that principle, so decided, to all claims relative to all underground conditions and subsurface structures, involving about 90% in value of plaintiff's claims, or about $62,000.

The Circuit Court erroneously agreed with its construction and its decision is reversible as a matter of law.

The Court clearly erred in holding plaintiff assumed the risk of encountering these underground structures and conditions, whether shown on the plans or not.

This is *contrary* to the *rule in Connecticut,* and *in this* Court.

Tompkins v. Bridgeport, 100 *Conn.,* 147, 152.
United States v. Stage Co., 199 *U. S.* 414.
Hollerbach v. United States, 233 *U. S.* 165.
Christie v. United States, 237 *U. S.* 234, and others.

In the *Tompkins* case, *supra,* such structures were *erroneously located on the plans, delaying the work and causing added expense.* The Court says:

"It is not alleged that these misrepresentations were intentionally made, but being authoritative and misleading, it is not necessary to allege that they were intentionally false . . . For the delay and extra expense of dealing with such sewers, plaintiff might have recovered under the contract notwithstanding its general provision that the price bid shall also cover the care of existing service pipes and structures of all kinds affected by the work whether shown on the plans or not." (Citing the three cases decided by this Court, next above.)

It is to be noted that the *notations* above referred to in the blue prints stated *defendant supposed they were approx-*

imately correct. In *Mahoney v. Hartford Invest. Corp.*, 82 *Conn.*, 280, a *similar supposition* was made, and *plaintiff recovered for replacing an old condemned sewer with a new one;* and in *United States v. Atlantic Dredging Co.*, 258 U. S. 11, *a belief was expressed* by the Government as to the accuracy of the plans, and *recovery allowed, although it was expressly stated that there was no guarantee of the accuracy of the plans.*

Risks are not assumed unless a person has or ought to have knowledge and comprehension of the peril to which he is exposed. Knowledge of danger in one degree and of danger in a higher degree are not one and the same thing. Comprehension involves appreciation of its character and extent to form a basis for decision. It is a question of law here because everything is in writing including Exs. 22 and 25, upon which latter the trial judge put great reliance and held that: "Thus, notwithstanding this specific warning, affording him an unusual *locus poenitentiae*, he pressed on to the indicated outcome." (R. p. 42).

Dean v. Hershowitz, 119 Conn., 398, 412.

Exhibit 22 was a letter from Brewer to R. J. Ross, defendant's manager, pointing out various so-called "unbalanced" items in plaintiff's bid. *A careful analysis shows that it was not a warning to withdraw the bid; did not contain any reference to any items on which our claims are based,* and, in particular *did not mention* "preformed cradle, *erroneously located underground structures,* that no "outlet existed, nor *changes in methods of construction, nor underground conditions, nor anything else that actually affected the work, so the theory of the Court is without foundation, is clearly illogical and unreasonable, especially when Ex. 25, plaintiff's reply—stated it was anxious to obtain the contract and perform it "in accordance with the plans and specifications."*

Defendant *did not plead nor prove any modification of the terms of the contract.* Ex. 22 was written *after the bids*

were submitted and opened. Moreover our Ex. PP, shows without contradiction, not only that the "unbalanced bid" was not responsible in any way for our losses, but that because of it, as the material and quantities actually used on the job, at the unit prices, proved, we reduced our losses by $4,211.00. (Mr. Buck's Evid., pp. 793-4). (Mr. Ciraci, pp. 741-43).

In *Freund v. United States,* 260 *U. S.* 60, this Court says: (as to a contended modification of the contract)

"We think there was no acceptance of the new route under such circumstances that would bar recovery for what the services were reasonably worth . . . They had been nursed into making the bid and giving the bond . . . At the time the contract was executed, the department had formed the purpose to thrust on the contractor this burdensome route . . . We cannot ignore the questionable fairness of the conduct of the government, aside from the illegality of the construction of the contract insisted on . . ."

And in *E. & F. Construction Co. v. Stamford,* 114 *Conn.,* 250, our Supreme Court *held plaintiff was still entitled to rely upon the plans and specifications in any modification of its bid.*

No *modification of the contract was pleaded, nor did defendant show that plaintiff "understood" the contract was modified by Exhibit 22—plaintiff's letter, Exhibit 25, conclusively shows it understood that it was taking the contract in accordance with the plans and specifications.*

Utley v. Donaldson, 94 *U. S.* 29.

Defendant did not place any *reliance* on *Exhibit 22,* as it was *used only to cross-examine Mr. Ciraci,* and *was not offered in evidence until the trial judge inquired about it being laid in.* (p. 965). Defendant *abandoned the theory that plaintiff's losses resulted from the "unbalanced bid",* and, in argument, *set forth the "warning, and chance to withdraw" theory, which the trial judge accepted. This point is em-*

phasized, because the trial judge reserved discussion of these letters as a *climax to his denial of any equitable relief viz*: "Thus, notwithstanding this specific warning, affording him an unusual *locous poenitentiae, he pressed* on to the indicated outcome." (R. p. 42). The Court on appeal, affirmed the construction of the contract by the trial judge.

Said Court was clearly in error in its construction of the provisions, Exhibit, A, p. 21, Par. C; making the Engineer the Judge, which, in effect, makes him the sole judge of the law of the contract, whose conclusions are final or a condition precedent to all payments either under or outside of the contract and that he can remould the contract by enlarging provisions of it, and enforce it to the exclusion of any discretion in the court, leaving plaintiff without any remedy unless he concedes liability. This does not make for justice, and it is against the weight of authority and public policy.

137 *A. L. R.* 530ff, Annotation and cases cited.
Salt Lake City v. Smith, 104 *F.* 457.
Clover Mfg. Co. v. Austin, 101 *Conn.,* 212, 214.
Freund v. United States, 260 *U. S.* 60.

In the *Freund* case, *supra,* Mr. Chief Justice Taft says:

". . . Such contract provisions have been interpreted and enforced by executive officials as if they enabled those officials to remould the contract at will . . . This does not make for justice; . . . These considerations . . . have made this Court properly attentive to any language or phrase of these enlarging provisions which may be held to limit their application . . . to what should be regarded fairly and reasonably within the contemplation . . . when the contract was entered into . . . This relieves us of considering conclusions reached by the Court of Claims."

In *Clover Mfg. Co.* case, *supra,* the *Connecticut Supreme Court* says:

"Bad faith may not amount to fraud or dishonesty . . . An engineer assumes a positive responsibility, and impliedly agrees that in making his decisions he will exercise the care to be expected of his calling to ascertain the facts, and will

be governed by the terms of the agreement . . . The parties bargain for some reasonable degree of expert knowledge of the facts and of the contract, and an Engineer who fails to give the parties what they bargained for . . . may justly be said to have acted in bad faith."

In *Gammino v. Dedham,* 164 *F.* 593 (a case typical of the weight of authority), the Court says:

" . . . The clause cannot be interpreted so as to deprive the parties of their rights to a judicial construction of the contract, so far as such construction involves matters of law relating to the present right of the plaintiff to maintain suit, and . . . whether plaintiff has received such compensation as he was legally entitled to under the provisions of the contract and under the evidence."

In *United States v. Stage Co.,* 199 *U. S.* 414, this Court held despite exculpatory provisions, that while it was their purpose to require extra or different work without additional compensation, as the Postmaster General had very considerable discretion, yet there *must be a limit to the power, otherwise he could ruin a contractor by new and wholly unanticipated demands,* saying:

" . . . Can such enormous increase of the service required and the expense entailed be exacted of a contractor who had agreed to perform new or additional services of the kind specified without additional compensation? . . . If this were a contract between individuals, a claim of a right to this additional work would hardly be seriously considered."

In *Salt Lake City v. Smith,* 104 *F.* 457, the Court says:

"The stipulation that the contractors shall do such extra work in connection with that described in the agreement as the city engineer . . . may direct is effectually limited by this fact to such extra work of proportionately small amounts as was necessary to the construction of the contemplated conduit . . . The stipulation in such contracts that all questions, differences, or controversies which may arise between the corporation and the contractors shall be referred to the engineer, and his decision thereof shall be final and conclusive on both parties, does not give the engineer jurisdiction to determine that work which is not done under the

contract and specifications, and which is not governed by them, was performed under the agreement and is controlled by it, and his decision to that effect is not conclusive upon the parties. Neither an engineer nor a judge who has no jurisdiction of a question can confer jurisdiction of it on himself by erroneously deciding he has it."

The court erred in restricting plaintiff to recovery under the contract as enlarged by its construction of the powers of the Engineer and denying recovery altogether on all of its claims for reasons stated in its decision concerning the exculpatory provisions of the contract.

In effect, it would be impossible to recover anything, for these provisions, literally construed, are broad enough to prevent it. For that very reason a majority of the Courts both State and Federal have allowed recovery outside of the contract—on equitable grounds, because they have recognized that it is inequitable to throw all risks of loss on the contractor, while the owner has and retains the benefits of the additional work, is unjustly enriched, and the courts are powerless to restore the *status quo.*

It is, we submit, clearly apparent that no equitable considerations were given by either the trial judge or the Second Circuit. The trial judge found that no basis of equitable appeal existed because of the exaggeration of the claims both in kind and amount, and the letters asking for more time did not mention the delays now claimed, and the exhibits 22 and 25. *He did find that plaintiff had sustained a substantial loss of over $20,000,* exclusive of depreciation on its equipment and of any profits. (R. p. 41). He also found that the work was completed on April 1, 1938—3 months after the completion date, and surface work had been given to two approved subcontractors at a cost of about $5000, and that defendant paid one of these subcontractors additional amounts to complete the work. Plaintiff claimed that it lost profits on the *contract* of $25,000; and on the *extra work,* $15,000, making the total cost $199,908 for the entire sewer.

It would have been better if plaintiff had refused to go ahead unless written orders were given, or a satisfactory agreement made as to the unforeseen difficulties, and inserted the causes of the delay in the two letters. But want of caution and the existence of faith and reliance on defendant's promises should not be held to be a waiver, or to deprive it of a valuable right.

Sartoris v. Utah Constr. Co., 21 F. 2d, 1.

Looking backward, it can now see that defendant's promises did not amount to anything, eg. the promise to give consideration to extensions of time when the work was completed—and its prompt appropriation of every dollar possible for liquidated damages. Neither did it then know that an outlet would not be ready as promised; nor that defendant would seek to evade payment of $22,626 worth of cradle work by admitting it would pay for the "grout"; nor that it would give written orders for 4 small matters costing less than $450, and thereby seek to justify its position as careful even in small matters, while it orally directed work at additional expense of $68,632. Neither did it then know that this defendant in Blakeslee v. Water Comrs., 121 Conn., 163, had denied authority in its general manager to make an oral promise to pay for additional expense arising out of war conditions; claimed that a receipt for a final payment of the original contract price was a release in full, even at the time it was negotiating with the contractors to settle their claim for such additional expense, and attacked the constitutionality of the very Act it had sponsored to enable it to pay for such extra expense; nor that defendant stood by there, as here, and saw all the work being done and sought to keep and retain the benefits without paying therefor.

Prima facie, plaintiff's losses and lost profits should have been the measure of its recovery, especially as defendant did not prove that they were unreasonable or extravagantly made, and no claim was made that plaintiff was incompetent,

nor that its work had not progressed satisfactorily nor any other complaint made as defendant could have done under Exhibit A, p. 27, par. M 1.

Dean v. Conn. Tob. Corp., 88 *Conn.*, 619, 624.

This seems conclusive that defendant realized that work of great magnitude and expense was being placed on its property, when it knew it was not covered by the contract, *reasonably construed*, to embrace what the parties had in mind when they made it.

These claims could not be reasonably called exaggerated when it took 9 months to complete the work on a six months contract, an increase of 50% of the time consumed; and when the extra cost was almost exactly 50% of the contract price.

Tompkins v. Bridgeport, 94 *Conn.*, 659.
United States v. Behan, 110 *Conn.* 338, 344.
Montrose Contr. Co. v. Westchester, 94 *F.* 2d. (2d. Cir.) 580.

These cases hold that it does not lie in the mouth of the party who has caused losses to an injured party, to say that the party injured has not been damaged by at least the amount he has fairly and in good faith laid out and expended, unless he can show they were extravagant and unnecessary. The burden is on defendant to prove that fact. This defendant totally failed to do under a proper construction of the contract, and the application of equitable principles.

CLAIM NO. 1.

The Court clearly erred in holding that the contract, supplemented by four blue prints, incorporated by reference, reasonably indicated or required pouring the concrete cradle and allowing it to harden before the pipe was laid upon it.

The Court bases its conclusion solely upon interpretation of Type C construction as set forth in Exhibit C.

Exhibit C has only *two notes* relative to Type C. *One* provides:

"If any pile foundation under reinforced concrete pipe is ordered, concrete cradle and pile cap will be paid for under the item for Class A Foundation Concrete."

This provision clearly does not apply, as it was admitted that no pile foundation nor pile cap was ordered or used on the entire work, including the river crossings. Mr. Brewer, defendant's Engineer in charge so testified. (Evid. pp. 942, 943).

The *only other note* provides:

"Type C construction will be paid for at the price bid for Type A construction *plus the cradle concrete* and *plus cradle reinforcing* if any is used."

Type A, under Exhibit C, was to be constructed by laying the pipe on the bottom of the trench, and *pouring* and *tamping fine gravel,* or *a mixture of equal parts of crushed stone and sand,* tamped in place.

Type C, therefore, had *two* different constituents:

1. *Cradle concrete* was *substituted* for the *gravel or said mixture;* 2. *Reinforcing.*

The Circuit Court does not explain *why* Exhibit C shows Type C was to be *preformed.* The trial judge held that the provisions in the contract for preforming the cradle "are not wholly free from ambiguity." (R. p. 33). If they were *ambiguous,* under well-settled rules of construction, they

should have been construed *strictly against defendant,* and *in favor of the plaintiff. This is especially true when it was admitted by defendant that it knew of no other place than in Hartford where such preforming of cradle had been used, and that it had used preforming in only three out of the eighteen contracts for this entire project.* (Evid. pp. 938, 939, 872). *Plaintiff had never before heard of "preforming" a cradle in its 25 years of experience in similar work.* (Mr. Ciraci, p. 462). *Inasmuch as the use of such "preforming" was local to Hartford, and very limited even there, it is only logical to conclude that such a requirement should be described in such a way as to leave no ambiguity or doubt as to what defendant would require of plaintiff in this work.*

Alvord v. Belden, 4 *Conn.,* 461, 464-5.

There is a provision in the specifications which show that defendant *was able* to *fully describe* "preformed" work. Exhibit A, p. 63, par. 65, *fully described the preforming and curing of pipe.* Under one method of "curing" such pipe, it specified "until 6 days old"; and the other: "until they are 3 days old."

Had it desired to reasonably disclose to plaintiff and other bidders that preforming or curing would be required in Type C construction it would have been the easiest thing in the world to accomplish! *Fair* and *honest dealing* would seem to *require* it to *plainly specify its purpose to "preform" the cradle;* and it was a *concealment* and *non-disclosure* to have omitted such an *important feature* of the *desired work* for a *distance of 1093'; at such an additional expense*— $22,626 to plaintiff. Rightfully, *it should have been specifically described* and *formed an important part of the agreement about which there could have been no doubt.*

Alvord v. Belden, 4 *Conn.,* 461, 464-5.
Home Owner's Loan Corp., v. Stevens, 120 *Conn.,* 6.

The Court could not, then, *reasonably conclude* that the "cradle concrete" which was to be substituted for gravel or a mixture of crushed stone and sand, under Exhibit C, was to be *preformed.*

The only other feature different in Type C from Type A is *reinforcing,* which means placing steel in such a way as to strengthen the construction. Reinforcing could be required on any Type of construction, except Type A. It is a *strained construction of the contract to hold that the presence of reinforcing would reasonably indicate to plaintiff that the concrete was to be preformed.* The *testimony of defendant* shows that such reinforcing *could be used on the cradle work,* (as it was specified in Exhibit A, p. 71, par. 82, which is a Special Provision, and was to govern under the provision in Exhibit A, p. 40.) by *placing the steel on sills,* or *by boring holes in them and placing the steel therein.* (Mr. DeMay, Evid. pp. 1016-17).

There is, then, we submit, no reasonable basis for the Court's construction of Exhibit C to require "preforming" the cradle under the *second* note, *either under part one substituting concrete cradle for fine gravel, or mixture of crushed stone and sand,* or *under the other providing for reinforcing.* Exhibit *D,* which the trial judge found *confirms such construction to require preformed cradle on level ground, does not pertain to Type C, but to river-crossings, solely.*

The notes on the *plans* relied upon by the Circut Court *are controlled by the "Special Provisions" of the specifications,* Exhibit A, p. 71, par. 82, where *all types of cradle construction is specified in detail,* and *govern* under Exhibit A, p. 40 (near bottom). *Its conclusions, then, we submit, have nothing to reasonably support them, and its construction of Exhibit C is clearly erroneous.*

Both Courts *relied largely* upon the *great power* given the *Engineer,* in Exhibit A, p. 21, par. C. But under Exhibit

A, p. 71, par. 82, *he was expressly limited* to a *choice* of *two methods, neither of which mentions preformed cradle, and no reasonable construction of that paragraph authorizes him to order it.* That paragraph says: "The Engineer will direct which method to be used."

These *two methods* of constructing *cradle* are briefly:

"82. In types B-1, B-2 and *C* construction . . . It is expected that the lower portion of the fill will be placed as each pipe is laid so that the compacting may be done not only on the side of the pipe but also in front of the pipe just laid; the remaining fill to follow closely.

"Where foundation concrete Class B is ordered, the pipe may be laid upon approved sills and the concrete poured in place underneath and around the pipe or the sill may be set and the concrete poured to a point slightly above the bottom of the pipe, and the pipe immediately laid upon the fresh concrete and sills; the remaining concrete to follow closely. The Engineer will direct which method is to be used."

It is submitted that these *notes* on Exhibit C, and the *specifications* "negative" the *time interval for curing,* under the proper construction of them, and bearing in mind that *curing* could have been *expressly provided* in them, and that *this method of construction* was *most unusual,* and *confined strictly to three contracts in Hartford,* and that *plaintiff* had *never heard of preforming a cradle* in its 25 years of experience on *similar sewer work.*

The Engineer certainly could not "remould" the contract and enforce it, nor construe the law and the facts of the contract and apply them, as both Courts held. It is against public policy.

> *Freund v. United States,* 260 *U. S.* 60.
> *Salt Lake City v. Smith,* 104 *F.* 457. (8th. Cir.).
> *Annotation,* 137 *A. L. R.* 542ff, and cases cited.

To require *preforming the cradle* was not the *exercise* of *a reasonable degree of expert knowledge* on the part of the

Engineer, and amounted to *bad faith* on his part. Bad faith need not amount to fraud or dishonesty.

Clover Mfg. Co. v. Austin, 101 *Conn.,* 212, 214.

The Court clearly erred in holding itself so inexorably bound by the Engineer's interpretation and construction of the contract terms, which in effect, made the Engineer the sole judge of the law and the liabilities arising out of the contract, and that he must approve of or concede liability for a claim or it was invalid.

Annotation, 137, *A. L. R.* 542ff, and cases cited.

The Court clearly erred in holding plaintiff made no objection at the time the work was done that it was an extra or would delay the completion of the contract.

This is *contrary to defendant's own evidence.* Mr. Brewer testified (p. 884) as follows:

"The Court: I understand that he did make some protest along two lines. The first was that he could lay Type B faster, whatever name he may have used in describing it, and the other was that he was having to do extra work on the grouting." The witness: "That is right . . . In fact, on sills, he could lay faster than he could with the preformed cradle." (p. 881); "Mr. Ciraci spoke about the grout, and he said it was not specified on the plans he thought he should be paid extra for it."—as soon as blueprint Ex. F was handed to him the first of July just before the work started (Evid. pp. 870-1); "In fact, there was no description of that *method of construction* in the *specifications.*" (Evid. 872). Mr. Ciraci testified that on at least *two occasions* Mr. Brewer told him that "he need have no fear doing anything which the District ordered as it always paid contractors fairly for anything done on its instructions if not called for in the plans and specifications" (Ex. H, pp. 2-3; Evid. p. 482, viz: Q. Did you ever claim an extra for it until the work was done? A. No, because I understand that anything that was extra we would get paid for. Q. When was that understanding arrived at? A. In July. Q. With whom? A. Mr. Brewer.

Q. At the time when you spoke to him about the preformed cradle he made it all inclusive? A. Yes, that anything that was extra that was not covered by the specifications, if I could prove it was not covered by the specifications, would be extra. . . . Q. So you saw no necessity of making claim for these various items as extras as you went along?' A. No. We just made a notation ourselves . . . I thought the inspector was making his notation, too"); and Ex. H, p. 3 where Mr. Ciraci asked Mr. Root, Chief Inspector to let him talk to Mr. Brewer, as the work as ordered was making a very considerable delay in the job. This was July 2, 1937—the second day after beginning work on the contract. Shortly afterwards Mr. Brewer visited the work and confirmed Mr. Root's instructions, and assured him the District would compensate him fairly for any extra work.

It is respectfully submitted that these circumstances fully justified petitioner in its understanding that any extra work provisions were *waived,* and a *new arrangement* made as to any work which was in fact extras on the entire job, and that it would pay him reasonably for such work when the whole job was finished, and *dispensed with the necessity to file any written claim.* It also *explains* why he *continued to furnish labor and materials of great magnitude because he relied on Mr. Brewer as he was an Engineer* (Evid. pp. 386); *and would not have done this work for which extras are claimed if payment had not been promised when the sewer job was complete.* (pp. 261-2). It *also explains why he thought it unnecessary to refer to these causes in the two letters, Exs. U and V, and continued to do such work after receiving replies thereto from defendant relative to extensions of time to complete the job, wherein respondent promised to give such requests proper considerations,* but subsequently withheld the full $20 for every day possible from date of completion stated in Ex. A—December 31, 1937. It would certainly not be a "natural impulse" to again speak of any delays and extra expense when he thought he had been promised pay for *all extras when the sewer was completed,* any more than to remind defendant, from time to time, he had a contract to do the sewer work, Ex. A. As to

plaintiff, the requirements of the Engineer were no more clear than it was also clear that any extra work would be paid for, including this work.

The Court clearly erred in holding "no actual delay was proven. Plaintiff's records are far from complete, and one important diary is lost". A full set of books are in evidence (Exs. FF and GG; time books; a diary, HH; Ledger, Ex. II; a Journal, Ex. JJ; concrete bills, Ex. KK; quantity of stone used, Ex. AA; cost of job, analyzed and summarized by a Certified Public Accountant, Ex. OO; and especially, for *this claim, computation of actual cost of Claim No. 1,* (Ex. K), and a summary of the cost of the entire job, (Ex. J), all of which books were kept by plaintiff, in the regular course of business by a bookkeeper, under the supervision of Mr. Ciraci, (pp. 240, 312). While one diary was lost, and could not be found, *it had been used in making up the itemized claims* (Mr. Buck, Evid. pp. 782-3); and the total figures claimed are reasonable and accurate, as *every effort was made to avoid duplication of items.* (Mr. Buck, Expert Cost Accountant, Evid. pp. 1197-8, 784); and that the work was disrupted and disorganized by reason of all work for which extras are claimed, (p. 819), and Claim No. 1 is reasonable (p. 765); and on the basis of the evidence it would disrupt and disorganize the work radically (p. 819); the chief thing that will run into money is due to the delay while the cradle cured, but other things would amount to a substantial sum over the entire job, the excavating, the grout, the labor grouting, and screeding, and form work (p. 766). On defendant's testimony, the possible delay is computed as 41 days delay as against ours of 77 days, (Mr. Stevens, employee of defendant as inspector and cost accountant, p. 1146), on the basis of which Claim No. 1 would be about $14,775; but he *erroneously divided this by 3, the number of gangs, a definitely incorrect method* (Mr. Buck, pp. 1209-11). The Books of defendant are admitted by it to be inaccurate (Mr. DeMay, p. 974). Mr. Stevens figures based thereon are therefore incorrect and misleading. His crowning basic

error, however, was his allocation of all this work into *four locations* and used our word section to designate each, whereas we used *section* to *designate a cradle 30′ to 40′ poured at one time.* Thus *his* section at No. 4 is actually *eight* sections, and are actually *two locations* instead of *one;* he specifies South of No. 3 as *three* sections, when there were *nine* poured; and *six* sections poured South of No. 2, and *five* between Nos. 1 and 2 crossings. Using his figures logically carried out, we have, North and South of No. 4, 12 sections at $284.93, cost of gang, times 4 days each section, $13,700.00; *6* sections South of No. 3, plus *5*, between Nos. 1 and 2, and *9* North of No. 2 or *20* sections times 4 days delay, at $237.63, total $19,000; Grand Total, $32,700 as against our claim of $22,626.

We have used Mr. Brewer's own testimony of an average of 4 days delay in the above figures. The Court's conclusion that the preformed cradle "facilitated" rather than delayed progress (R. 32) is, therefore, *arbitrary, illogical* and *unreasonable; is against the evidence of both parties, and unmistakably shows that his conclusions are erroneous as matters of law on admitted facts.*

Systematic planning was impossible on account of waiting, in some areas, for the trench to be opened up, before ordering preformed cradle, and the limited working area where the fences, dykes, river-crossings etc admittedly made such planning impossible. (Mr. Brewer, p. 948), (Ex. H, pp. 1-25). Consequently the conclusion that the *most natural method of manufacturing* it was by "curing" and the *other like conclusions are contrary to the undisputed and admitted facts, and clearly are erroneous, illogical,* and reversible.

The Court was clearly wrong in failing to hold the Exs. F and G constituted "Orders in Writing" within the meaning of the contract. They were *detailed blueprints of the work to be done, signed by Mr. Brewer, and handed to Mr. Ciraci by him. The fact that no price for the work was*

fixed does not prevent them having this legal effect; and they are waivers of the written order provisions; defendant is estopped thereby. They *do not serve as illustrations* of the *work under the contract,* but *specify new and different work upon which the minds of the parties never met.*

Sartoris v. Utah Constr. Co. 21 *F.* 2d. 1.
Certoarari denied, 278 *U. S.* 651.
Expanded Metal Etc. Co. v. Noel Constr. Co., 101 *N. E.* (*Ohio*) 108.
Lantry Etc. Co. v. Atchinson Etc. Co., 172 *P.* (*Kan.*) 527.
Munro v. Westville, 36 *N. S.* 313.

The importance of the "grout" was entirely overlooked or disregarded by both Courts. It was evidently confined to the *cost of the material* which is *comparatively insignificant.* It is a rich mixture of sand, cement and crushed stone. Its *real importance* is that it really *transforms* the plans from one *method of construction, described in the plans and specifications, to one vitally different because it requires "preforming"* or "curing" *before the pipe is laid.* The Courts failed to appraise and value the importance of it. *It is then, a pure question of law* whether plaintiff should recover under a proper construction of the contract, and the application of the admitted facts. It necessarily follows that plaintiff suffered direct and consequential damages from this *method of construction.* It proved its costs, and lost profits with its own and defendant's testimony, and with its books kept in the regular course of business, now in evidence.

It is respectfully submitted that it is evident the Court misconstrued the contract, failed to grasp the practical problems involved and the engineering and construction problems; reached its conclusions on erroneous principles of law and failed to apply equitable principles but reached conclusions that are clearly against equity and good conscience, and results in extreme hardship to plaintiff while defendant

received and retains the benefits thereof, and other reasons herein given. *They are all pure questions of law and reviewable here.*

CLAIM NO. 2.

The Court was clearly *wrong* in holding that the "dotted lines" on Ex. B did not *mislead* plaintiff, because it was on notice its contract was part of a larger project, and Exhibit B itself showed that the point marked as the "Beginning of contract No. 18" (plaintiff's contract) was the "End of contract No. 16". "There was no justification for assuming that the dotted lines indicated as existing sewer. Moreover, several weeks before Mr. Ciraci signed the contract on behalf of the plaintiff he knew that there was no outlet at Farmington Avenue . . . The claim was properly held untenable". (133 F. 2d, 469-70, par. 3).

Plaintiff's testimony shows that these "dotted lines" could not be reasonably interpreted other than that they indicated an existing structure. (Mr. Buck, pp. 767-8) and (Mr. Ciraci, p. 21-23, Ex. H); that everywhere else "dotted lines" indicated existing structures, sometimes labeled, others not, (p. 767-8). The trial judge suggested this was not a natural interpretation—that his impression, without any complete knowledge of the plans, was that "existing sewers" are marked "existing" and *this* is not. (p. 767). Mr. Buck explained that it was a "symbol", and wherever it was used on the plans it indicated an existing structure—and "no other interpretation could be put on them than to indicate "existing structures". (pp. 767-8). Mr. Ciraci had read plans for 25 years and "dotted lines" *always indicated existing structures* (pp. 365-6; 369); that he expected to be able to drain this work into this outlet (p. 366); had never before found such an outlet could not be used to do so, (p. 376); just had to put a ball cap in front of pipe and no dirt will go into old sewer—just the water (p. 376); everywhere else

he could "assume" the outlet could be so used (p. 377); if such outlet was not to be used, it must be so specified on the plans by some reasonable notation to that effect (pp. 367, 377). Mr. Buck testified good engineering practice required the plans to include all information to enable contractor to make an intelligent bid, and a complete analaysis of what the Engineer required; where no outlet exists the plans should bear a note describing the situation and state what the Engineer expects him to do with water in the work; unless noted in the plans, always construct a sewer up-grade; if no outlet exists it considerably increases the cost of the work and especially so here where the under-drains were picking up and discharging water right at the point of digging and laying pipe which immeasurably increase the difficulty of the work. (pp. 768-770). Defendant *did not dispute these interpretations* of the "dotted lines"; and agreed with us as to good engineering practice, and that an outlet was of tremendous importance; that here a bidder could not have ascertained whether or not an outlet *actually* existed *unless he asked questions* (Mr. Brewer, pp. 916-917); if an outlet existed, gravity would discharge the water and it would flow away (p. 917); plaintiff had no outlet until all work nearly completed, about which nothing was said; the plans would be acted upon by bidders and mistakes in the data would put a bidder at a disadvantage (p. 914); there was no information in the documents submitted to bidders to show how the work was to be affected other than a general reference to this being a part of a larger project—and no reference was made to contract 16; nor that it was incomplete; although Mr. Brewer admitted it *ought to have been referred to or listed,* as *he knew No. 16 would not be completed for eight months* (914-920).

The Standard Clause (Ex. A, pp. 28, par. N: 3: and par. 50, par. 29) about pumping did not embrace this item of extra cost—only pumping and keeping the working point dry for laying joints (Mr. Buck, pp. 805-6); this can be done with a small 2″ pump which passes the water into a

few lengths of pipe and it flows away automatically in this—a gravity flow sewer (Mr. Buck, pp. 768-770; 805-806); (Mr. Ciraci, pp. 393-4); water accumulated from ground water, rains and floods and had to be pumped out (pp. 393-4) because the water had no place to go. All of it would have flown away if an outlet had existed (p. 395) (Mr. Buck, pp. 805-6); (Mr. Brewer, p. 917).

The trial judge erroneously held, as a matter of law, under the provisions of Ex. A, p. 50, par. 29, this claim was clearly untenable because plaintiff agreed to provide all necessary pumps and satisfactorily remove the water; that the river was a natural outlet and if an outlet existed the grade was insufficient and that the sewer was not designed for ground water. (R. p. 36). *Such a construction is plainly contrary to the evidence of both parties, and is unreasonable and illogical.* After the river-crossings were built there was no outlet to the river (p. 396). The plans show that, except at or near these crossings, the river was too far way too be an outlet. The sewer was, concededly, a gravity one and sufficient to flow the water away. The provisions cited applies only to pumping ground water at the point where the pipe is laid, and the plans showed practically no ground water at all. (Ex. B).

Both Courts were clearly in error in placing so much importance on the provision that this "was but a part of a larger project". Fair dealing would dictate that the *duty of disclosing all information affecting the work rested solely* on *defendant.* It, *only,* knew, or had the means of knowledge, of *where* and *how* other projects would *affect* this work. It had superior knowledge, as it had supervised and inspected all other work performed. To require a bidder to search out all defendant's records of 17 contracts, we submit, is unreasonable, when defendant had all of it at its finger tips *and was under the highest duty to disclose to bidders how and where his work would be affected. It is only fair play, common sense and honesty to do this. How*

could plaintiff *cooperate* with other contractors when it was *not informed* as to the *condition of their work* or *how* it *affected* the *work it was to do? In spite of the admitted short comings of defendant,* the Courts passed over them, and *held plaintiff responsible for them*!

The same argument holds true as to the notation that this is the "Beginning of contract No. 18" and the "End of contract No. 16" *so much relied on by both courts.* Reasonably, this merely denotes the *place, not the condition,* where *plaintiff's work was to begin*! It could not possibly *connote* that *contract No. 16 was incomplete,* and that it *would not be completed until this work was also completed.* It was the *highest duty of defendant* to *point out* all the *conditions* that would *affect* this work. This it admittedly did not do! (Mr. Brewer, p. 915-990). Courts may not thus *reverse* the *rights* and *duties* owed to each other by the contracting parties!

It was unreasonable to hold that a personal examination by a bidder of the terrain shall excuse such *wilful defaults of defendant,* who *knew* in *detail how* and *where* the *conditions* of *other work* would *naturally affect the work to be let*! After all, some *honesty* and *fairness* is *due a bidder* on a contract. He is not expected to *search the minds* of the defendant; it was under a duty to speak. Every party to a contract has a right to assume he has been fairly dealt with, and that disclosures have been made as to all important information which will affect the work to be done.

Water Comrs. v. Robbins,, 82 *Conn.,* 641ff.

Plaintiff did not know, when it submitted its bid, that there was no existing outlet. It discovered there was not, after the bids were opened. Mr. Brewer then told Mr. Ciraci that there was none, and said he expected it would be ready in about six weeks. Relying on this, plaintiff changed its plans of operation; and when extra pumping was being done,

relied on Mr. Brewer's promise that if any extra work was done, it would be paid for. Mr. Brewer denied any such promise, but the trial judge made no finding on this point, placing its decision on Exhibit A, p. 50, par. 29, and that Mr. Ciraci examined the terrain before he made his bid and there was no excuse for a misunderstanding here (R. pp. 36-37), which involve pure questions of law. It is evident that no sum was included in the bid to cover the contingency that arose. Defendant, in its pleadings, relied solely upon the provisions of the contract. The Circuit Court placed its decisions *on issues not raised by the pleadings*, and *not embraced in the findings*. Plaintiff did this work, reasonably relying on its understanding that it would be paid for, and that it would have an outlet in six weeks. It is submitted that it should recover on this claim.

Horgan v. Mayor, 55 *N. E.* 204.
United States v. Spearin, 248 *U. S.* 132.
Annotation, 76 *A. L. R.* 268ff, and cases cited.
Tryon v. White, 62 *Conn.*, 161ff.

CLAIM NO. 3.

This claim is for $11,835, and embraces 5 items as set out in the Statement.

The Court erroneously excluded this claim because of the warnings on the plans, and the provisions of Exhibit A, p. 28, and p. 49, par. 28. (R. p. 37) and 133 F. 2d. 470 (4); and because they were underground structures and no claim was made in writing when the work was done.

These principles have been discussed elsewhere herein. Recovery depends on the construction of these provisions, and embrace pure questions of law.

CLAIM NO. 4.

Furnishing of stone, as ordered, was expressly made an extra under Item 17, Exhibit A, p. 46.

The Court erroneously held Item 16 applied.

Item 16 provides when stone is to be used; Item 17 for payment.

CLAIM NO. 5.

The Court clearly erred in denying recovery because concededly plaintiff constructed the river-crossings in accordance with the plans and to the entire satisfaction of defendant's Engineer. There was an implied warranty of sufficiency of the plans for the purpose for which they were intended.

Tompkins v. Bridgeport, 94 *Conn.,* 659, 680.
United States v. Spearin, 248 *U. S.* 132.
Christie v. United States, 237 *U. S.* 234.

The Court clearly erred because defendant waived or is estopped to escape payment by waiting to test these crossings as provided under Exhibit A, pp. 68, 69, par. 79, until they were fully completed and backfilled, necessarily increasing the expense of testings.

CLAIMS NOS. 6, 7 AND 8.

No. 6. This private drain was unknown to either party until it was encountered in the trench. The Court clearly erred in excluding it as an underground structure, under Exhibit A, p. 49.

No. 7. The Court clearly erred in rejecting this claim under Exhibit A, pp. 45-6, pars. 14 and 15; because par. 14 placed ultimate liability on plaintiff for damages due to settling, etc.

Annotation, 137 *A. L. R.* 530ff.

No. 8. The Court clearly erred in denying recovery under Exhibit A, p. 56, par. 49, because payment for all steel is provided for in Item 16, p. 81, Ex. A.

CLAIM NO. 9.

The Court clearly erred in rejecting this claim because it was an underground structure.

CLAIM NO. 10.

The Court erred in rejecting this claim, because the by-passing of this sewer was paid as extra (Ex. 6). Cost of pumping the sewage was also an extra, and should have been paid.

Henderson Bridge Co., v. McGrath, 134 *U. S.* 260.
Sartoris v. Utah Constr. Co., 21 *F.* 2d, 1.

CLAIM NO. 11.

The Court clearly erred in rejecting this claim under Exhibit A, p. 50, par. 29.

CLAIM NO. 12.

The Court clearly erred in rejecting this claim under Exhibit A, p. 76, par. 98, when it should have been allowed under par. 100, and payment made under Item 1, Exhibit A, p. 13.

CLAIM NO. 14.

The Court erred in rejecting this claim under Exhibit C, and Exhibit A, p. 46, par. 17, when it should have been paid under Item 9, p. 79, Exhibit A, a Special Provision which governed.

CLAIM NO. 15.

The Court clearly erred in holding the delays were not due to any deviations by defendant from the terms of the contract.

This item depends on the construction of the contract and the application thereof—a pure question of law.

Owen v. United States, 44 *Ct. Cl.* 440.

CLAIM NO. 16.

The Court clearly erred in not allowing full recovery, because no Counter-claim was filed as required by Rule 13 (a) of Federal Civil Procedure; and by failing to hold defendant waived the provisions of Exhibit A, p. 25 I (3); or is estopped to deny liability when it keeps and retains the benefits.

Connelly v. Devoe, 37 *Conn.,* 570.
O'Loughlin v. Poli, 82 *Conn.,* 427, 435.
Williston, Contracts, Sec. 789, p. 1511. (1924 Ed.).

CONCLUSION.

Under the applicable decisions of the Supreme Court of Errors of the State of Connecticut, governing the local law of contracts; the applicable decisions of this Honorable Court, governing the general law of contracts; of the applicable decisions of the different Circuit Courts of Appeals, which seem conflicting; and the applicable decisions of the weight of authority of State and Federal Courts, on the general law of contracts of this kind, it seems clear that The United States Circuit Court of Appeals erred in affirming the judgment of the District Court. The questions involved are of general importance, and it is in the interest of the

public to have an authoritative decision as to the general law of such contracts involving extensive public improvements, and it is respectfully submitted that the petition for a writ of certiorari should be granted.

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and

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